IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.11.2007

CORAM

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

W.P.No.28421 of 2003

R.Subbiah ... Petitioner

vs.

1. The Airports Authority of India
rep. By its Chairman
Operational Offices
Gurgaon Road, New Delhi 110 037

2. The Airports Authority of India
rep. By its Assistant General
Manager(Personnel)
Gurgaon Road, New Delhi 110 037 ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of ceriorarified mandamus calling for the records of the proceedings of the second respondent, in No.PERS-II/1007/1406/90 (PU)/4063 dated 2nd July 2003 and quash the same and consequentlly direct the respondents to fix and determine the seniority of the petitioner in the cadre of Airport Manager, reckoning the petitioner as deemed to have been promoted as Airport Manager with effect from 30.04.1996.

For Petitioner : Mr.R.Muthukumarasamy,
Senior Counsel
for Mr.A.Jenasenan

For Respondents: Mr.Vijay Narayan
Senior Counsel
for Mr.Parthiban

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O R D E R

This writ petition has been filed praying to quash the proceedings of the second respondent, in No.PERS-II/1007/1406/90 (PU)/4063 dated 2nd July 2003 and consequently direct the respondents to fix and determine the seniority of the petitioner in the cadre of Airport Manager, reckoning the petitioner as deemed to have been promoted as Airport Manager with effect from 30.04.1996.

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2. The brief facts leading to the filing of this writ petition are as follows :

(i) The petitioner had joined the Indian Air Force (I.A.F.) in August 1969 and had served in the Indian Air Force from 1969 to 31.08.1984. He retired from I.A.F. as a Sergeant, who was entrusted with security, counter intelligence and police duty in the airfield and he had a record of excellent and distinguished service during his tenure of 15 years in the I.A.F. After having been relieved from the I.A.F. in the year 1984, the petitioner has joined duty as Apron Security Supervisor in the International Airport Authority, Madras on 02.05.1985.

(ii) In the International Airport Authority, the next cadre of promotion was the post of Assistant Airport Manager, which fell due to the petitioner in the year 1988. The petitioner was not however called for the test for the sole reason that he was short by 49 days of the requisite 3 years experience. Though the petitioner had made representations to condone the shortage of 49 days, taking into account the fact that he had 15 years of blemishless record of service, his claim was not considered; whereas, a few other persons, who fell short of the requisite period of experience were given permission to appear for the written test. The discrimination meted out to the petitioner was solely due to the reason that he was an active member and President of the Workers' Union. Thereafter, the petitioner was promoted as Assistant Airport Manager in the year 1990 and he joined duty in May 1991 at the Mumbai Airport. After having served in the Mumbai Airport for about four years, the petitioner was transferred to Trivandrum Airport, where he joined duty on 15.06.1998.

(iii) The next stage of promotion from the post of Assistant Airport Manager is the post of Airport Manager (Operations) and the requisite qualification for the said post is an experience of three years or by direct recruitment. In the year 1996, a list of Officers, who were working as Assistant Airport Managers, including the petitioner and and 6 others who were working as Executive Housekeeping (who were not eligible) were called to appear for a written test and the petitioner has come out successful in the written test. On 11.04.1996, the petitioner was asked to attend an interview to be held on 12.04.1996 at 11.00 hours at New Delhi. The petitioner had performed well in the test and interview and he was expecting to be promoted as Airport Manager having due regard to his seniority and his performance. To his shock and surprise, the first respondent had passed an order on 30.04.1996, promoting 11 persons as Airport Managers, which did not include the petitioner. Since

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the 11 persons who were promoted were juniors to the petitioners and 4 of them being ineligible for being considered to the said post, the petitioner was constrained to file a writ petition before the Kerala High Court at Ernakulam in O.P.No.8131 of 1996. In the counter to the writ petition filed by the first respondent herein, it is stated that the petitioner was not promoted to the post of Airport Manager for the reason that he was not recommended by the Departmental Promotion Committee (D.P.C.) for promotion, since the annual confidential report of the petitioner was below average for 2 years and that he did not satisfy the bench mark.

(iv) Thereafter, there was an amendment in the Rules to consider the cases for promotion without a written test or interview and therefore, the petitioner was promoted as Airport Manager on 23.12.1999, pending O.P. before the Kerala High Court. On 11.01.2002, the O.P. filed by the petitioner before the Kerala High Court came up for hearing and the respondents represented that the petitioner had already been promoted as Airport Manager. The only question that arose for consideration before the said Court was the seniority of the petitioner to the post of Airport Manager. The High Court of Kerala passed an order recording the promotion granted to him and directing the petitioner to file a detailed representation with a further direction to the respondents to consider the same and pass orders within 3 months from the date of receipt of a copy of the order.

(v) As per the order of the Kerala High Court, the petitioner made a representation to the effect that he should be given promotion as Airport Manager with effect from 30.04.1996 and the action of the respondents in having overlooked his claim for promotion and he sought restoration of his seniority in the category of Airport Manager, reckoning his promotion as on 30.04.1996. Though there was a direction by the Kerala High Court to the respondents to consider the representation of the petitioner within 3 months, the respondents took their own time and ultimately, by order dated 02.07.2003, rejected the representation of the petitioner on the ground that he was promoted to the post of Airport Manager on the basis of the Departmental Promotion Committee held in 1999.
Aggrieved by the order of the respondents rejecting his claim for seniority, the petitioner has approached this Court for the relief as stated above.

3. The Deputy General Manager (Law) of the Airports Authority of India (International Airports Division) filed a counter affidavit on behalf of the respondents herein and stated that as per rules, candidates who have fulfilled the criterion of 3 years experience in the lower cadre are called for promotion and no relaxation has been given to the petitioner in the case of

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promotion from the post of Assistant Airport Manager to the post of Airport Manager. In the counter, he also brought to the notice of the Court, the correct date of joining of the petitioner in the Trivandrum Airport as 15.06.1995.

4. In the counter, it is further stated that as per the job specification applicable at that time, the promotion to the post of Airport Manager was also on the basis of a written test which the candidates had to qualify, followed by an interview of the qualified candidates. A Departmental Promotion Committee for filling up the post of Airport Manager was held on 12.04.1996 and the candidates in the feeder cadre were considered for promotion as per the amended job specification. The petitioner was considered along with other eligible candidates and though he was qualified in the written test, his name was not recommended by the D.P.C. and therefore, he was not found fit for promotion. Subsequently, the petitioner was promoted as Airport Manager with effect from 23.06.2000. During that period, job specification for promotion to the post of Airport Manager and interview was abolished and hence, the petitioner was promoted on the basis of the recommendation of the D.P.C. and since the seniority is determined from the date of promotion, the petitioner's seniority in the cadre of Airport Manager cannot be determined with efect from April 1996.

For the foregoing reasons stated in the counter affidavit, the respondents prayed for dismissal of the writ petition.

4. Heard Mr.R.Muthukumarasamy, learned Senior Counsel appearing on behalf of the petitioner and Mr.Vijay Narayan, learned Senior Counsel appearing on behalf of the respondents.

5. Mr.R.Muthukumarasamy, learned Senior Counsel for the petitioner contended that though the petitioner was due for promotion as Airport Manager in the year 1996 and had been called for written test followed by an interview for promotion to the said post, it is not open to the respondents to contend that the confidential report of the petitioner during the three years preceding the selection disclosed the records of the petitioner to be below average for 2 years and average for the third year. According to the learned Senior Counsel, if really the records of the petitioner had been below average for two years and average for the third year, he would not have been called for written test and interview. He vehemently contended that the action of the respondents in denying the promotion of the petitioner which was due to him in the year 1996 was on account of extraneous consideration and the said action was sought to be masked by the aforesaid contention which factually did not exist.

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6. Learned Senior Counsel for the petitioner further submitted that the promotion of the petitioner as Airport Manager in 1999 is not in dispute. It was his further contention that when the Kerala High Court has raised a question of fixing the seniority as regards the promotion of the petitioner de hors his actual promotion, the respondents failed to consider the same on the ground that the petitioner was promoted to the post of Airport Manager on the basis of the Departmental Promotion Committee held in 1999. According to the learned Senior Counsel, the respondents in having failed to consider the said question, have failed in exercising proper jurisdiction and pleaded that the petitioner, who is an ex-serviceman with extraordinary good record be considered for the post of Airport Manager with due seniority, with effect from 30.04.1996.

7. Learned counsel for the petitioner, in support of his contentions has relied on :

(i) a Supreme Court decision reported in (2006) 10 SCC 1 in the case of Reliance Airport Developers (P) Ltd. vs. Airports Authority of India and others, wherein it is held as follows:

> "102. H.W.R.Wade and C.F.Forsyth in their book Administrative Law, 7th Edition, (1994) discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "Jurisdiction over fact and law" in Chapter 9, pp.284-320. The decisions before Anisminic and those in the post-Anisminic period have been discussed in detail. At pp.319-320, the authors give the Summary of Rules thus:
>
> "Jurisdiction over fact and law : summary
>
> At the end of a chapter which is top-heavy with obsolescent material it may be useful to summarise the position as shortly as possible. The overall picture is of an expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together with the simpler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:
>
> Errors of fact

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Old rule : The court would quash only if the erroneous fact was jurisdictional.

New rule: The court will quash if an erroneous and decisive fact was

(a) jurisdictional
(b) found on the basis of no evidence;

or

(c) wrong, misunderstood or ignored.

Errors of law

Old rule: The court would quash only if the error was
(a) jurisdictional; or
(b) on the face of the record.

New rule : The court will quash for any decisive error, because all errors of law are now jurisdictional." (emphasis supplied)

The above position was highlighted by this Court in Mafatlal Industries Ltd. vs. Union of India, SCC pp.736-37, para 337. "

(ii) yet another decision of the Supreme Court reported in AIR 1979 SC 1622 in the case of Gurdial Singh Fijji vs. State of Punjab and others, the relevant portion of which is extracted as under:

"The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances, it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the

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adverse report and the infirmity in the link of causation is that no one has yet decided whether that report was justified. We cannot speculate, in the absence of a proper pleading, whether the appellant was not found suitable otherwise, that is to say, for reasons other than those connected with the non-issuance of an integrity certificate to him."

8. On the other hand, Mr.Vijay Narayan, learned Senior Counsel appearing on behalf of Airports Authority of India, the respondents herein, submitted that the petitioner has caused inordinate delay in filing the writ petition and pleaded that the writ petition ought to be dismissed. According to him, when the petitioner was promoted as Airport Manager in the year 2000, job specification for promotion to the post of Airport Manager and interview was abolished and hence the petitioner was promoted based on the recommendations of the Departmental Promotion Committee and it is for this reason the representation made by the petitioner was rejected.

9. Learned Senior Counsel for the respondents has relied on the following decisions in support his contentions :

(i) 1992 (2) SCC 299
(Baikuntha Nath Das and another vs. Chief District Medical Officer, Baripada and another)

(ii) 1996 (2) SCC 488
(Nutan Arvind (Smt) vs. Union of India and another)

(iii) 2000 (8) SCC 395
(Badrinath vs. Government of Tamil Nadu and others)

(iv) 2002 (9) SCC 765
(Joginder Singh and others vs. Roshan Lal and others)

(v) 2004 (2) SCC 76
(Ramrao and others vs. All India Backward Class Bank Employees Welfare Association and others)

(vi) 2006 (8) SCC 129
(Indu Shekhar Singh and others vs. State of U.P. and others)

10. The relevant portions of the decisions cited by the learned Counsel for the respondents are extracted hereunder :

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(a) In (1996) 2 SCC 488 in the case of Nutan Arvind (Smt) vs. Union of India and another, the Supreme Court has held as follows :

> "6. The DPC which is a high-level committee, considered the merits of the respective candidates and the appellant, though considered, was not promoted. It is contended by learned counsel for the appellant that one K.S.Rao was the officer at the relevant time to review the performance of the appellant whereas in fact one Menon had reviewed it. The latter was not competent to review the performance of the appellant and to write the confidentials. We are afraid we cannot go into that question. It is for the DPC to consider at the time when the assessments of the respective candidates is made. When a high-level committee had considered the respective merits of the candidates, assessed the grading and considered their cases for promotion, this Court cannot sit over the assessment made by the DPC as an appellate authority. The DPC would come to its own conclusion on the basis of review by an officer and whether he is or is not competent to write the confidentials is for them to decide and call for report from the proper officer. It had done that exercise and found the appellant not fit for promotion. Thus we do not find any manifest error of law for interference. "

(b) The Supreme Court in (2002) 9 SCC 765 in the case of Joginder Singh and others vs. Roshan Lal and others, has held as follows :

> "5. ... The High Court in exercise of its jurisdiction under Article 226 of the Constitution is not supposed to act as an Appellate Authority over the decision of the Departmental Selection committee. If the Committee has been properly constituted, as in this case, and the post is advertised and a selection process known to law which is fair to all, is followed, then the High Court could have no jurisdiction to go into a question whether the Departmental Selection Committee conducted the test properly or not when there is no allegation of mala fides or bias against any member of the Committee. Merely because there were a large number of candidates who appeared on two days, cannot ipso facto lead to the conclusion that the process of selection was a farce and fair chance was not given. ... "

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(c) In (2004) 2 SCC 76 in the case of Ramrao and others vs. All India Backward Class Bank Employees Welfare Association and others, the Supreme Court has held as hereunder :

> "27. ...An order issued against a person without impleading him as a party and, thus, without giving him an opportunity of hearing must be held to be bad in law. The appellants herein, keeping in view the fact that by reason of the impugned direction, the orders of promotion effected in their favour had been directed to be withdrawn, indisputably, were necessary parties. In their absence, therefore, the writ petition could not have been effectively adjudicated upon. In absence of the "promotees" as parties, therefore, it was not permissible for the High Court to issue the directions by reason of the impugned judgment."

(d) The Supreme Court in (2006) 8 SCC 129 in the case of Indu Shekhar Singh and others vs. State of U.P. and others, in paragraph 56 has held as hereunder :

> "... The appellants herein were not joined as parties in the writ petition filed by the respondents. In their absence, the High Court could not have determined the question of inter se seniority. In the case of Ram Janam Singh, this Court held :
>
> > "It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed because they purport to affect the

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seniority of persons who are already in service."

11. I have considered the submissions made by the learned counsel on either side and perused the materials available on record.

12. There are circumstances where the respondents can be directed to consider the claim of the petitioner for retrospective promotion, as held by the Supreme Court in its decision reported in (1997) 1 SCC 111 in the case of U.D. Lama v. State of Sikkim. Though the said decision is not factually applicable to the case on hand, the principles adopted therein can be followed in this matter for the sake of judicial review. The relevant portion of the decision is extracted hereunder :

> 20. On the other hand, it cannot be overlooked that the appellants were not appointed by following the regular procedure of appointment. Under Rule 4(1), recruitment could be made to the newly-created State Civil Service by competitive examinations to be held by the Sikkim Public Service Commission. This competition is not confined to persons who are already in government employment. The second method of recruitment is selection from persons serving in connection with the affairs of the State of Sikkim. In the second category of recruitment, specifically no provision of holding written examination and viva voce has been laid down. The respondents claim that had the procedure in Rule 4(1)( b ) been followed, they would have got into the Service without any examination. But their lawful expectation was denied by the failure of the Government to set up a Commission or appoint a Chairman. What would have happened in normal course, did not happen because of the Government's failure. Only because of this, quite contrary to the Rules, written and oral tests were held. This was upheld by this Court principally on the ground of what was described as peculiar situation. which was created by the absence of a Commission and its Chairman. The selection and appointments made in 1982 were dictated by peculiar circumstances obtaining at that time. The appointments were not made strictly in accordance with the Rules but, as was held by this Court, in exercise of the executive power of the State. It is true that some of the respondents appeared in the tests and did not qualify but there is substance in the contention of the respondents that they were entitled to be appointed even without these tests if Rule 4(1)(b) was followed. They were deprived of this chance. Even for Rule 4(1)

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(b), the instrumentality of Public Service Commission was necessary for making any appointment. Now that the Public Service Commission has been set up, the State Government has to undo the wrong that was initially done to these employees by subjecting them to tests which was not warranted by Rule 4(1)(b). Therefore, they should not be made to suffer in the matter of seniority or promotion in any way by failure of the State Government to implement the Rules laid down by it. In these circumstances by directing the new recruits to be treated to have been recruited on the day the appellants were recruited, the State Government has not done anything contrary or wrong but has really restored ( sic removed) the injustice done to the respondents by the State Government's failure to recruit them into the Service in accordance with Rule 4 (1)(b). In fact, the only door that was open to the appellants under the Rules to enter the Service was through Rule 4(1)(b). They might have also joined through open competition but neither of the two steps were taken or could be taken. In these circumstances, the appellants have really tried to steal a march upon the respondents by being successful in the tests which should not have been held in any event.

13. While deciding the case, it would be useful to refer to the relevant guidelines on promotion to Group 'A' and within Group 'A' framed by the Airports Authority of India, the respondents herein:

DPC-Composition and methodology of Assessment :

"10. The Departmental Promotion Committee for promotion upto the level of Senior Manager shall be chaired by respective Members and for promotion to DGM and above shall be chaired by Chairman, IAAI, being the respective appointing authorities.

11. As in Government each Departmental Promotion Committee will decide its own method and procedure for objective assessment of the suitability of the officers. Under the Government guidelines, the DPC is not guided merely by the overall grading, if any, that might have been recorded in PAR, but DPC makes its own assessment on the basis of the entries in the PARs because it has been noticed that sometimes the overall grading in the PARs may be inconsistent with the grading under the various parameters or attributes. Departmental Promotion Committee in IAAI, therefore, will have full discretion to devise its own way for

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moderation of the grading obtained by the officers in their PARs keeping in view the Government guidelines/instructions as applicable for the purpose."

14. In the instant case, even according to the respondents, the petitioner was considered along with the eligible candidates and though he was qualified in the written test, his name was not recommended by the DPC and therefore, he was not found fit for promotion.

15. In this context, it would also be useful to refer to the impugned order of the respondents, dated 02.07.2003, the relevant portion of which is extracted hereunder:

> "The above issue has been examined at appropriate level. The seniority in the cadre is determined on the basis of panel position as per DPC. Since Shri Subbiah was promoted to the post of Airport Manager on the basis of DPC held in 1999, his request for determining his seniority in the cadre of Airport Manager retrospectively i.e. from April '96 cannot be agreed to."

From a reading of the impugned order, it is seen that the respondents have not at all considered the case of petitioner in its entirety.

16. Apart from the above, the judgment of the Kerala High Court in the O.P. filed by the petitioner also deserves reference and the relevant portion of the said judgment is as under:

> ". . . During the pendency of this Original Petition, petitioner was promoted as Airport Manager as per Ex.P.9 order dated 23.12.1999. Therefore, the only question to be considered now is regarding his service seniority. In this case, petitioner may file a detailed representation before the respondents. Respondents are directed to consider and pass orders on the representation filed by the petitioner after hearing all the aggrieved persons expeditiously within three months from the date of receipt of a copy of this judgment along with the representation."

17. In view of the judgment of the Kerala High Court referred to above, this Court feels that the petitioner's case has to be considered with all relevant materials and the background circumstances under which he has moved the Kerala High Court for promotion and consequential reliefs. Thus, the respondents, while considering the petitioner's case regarding his seniority, cannot simply reject it mechanically without assigning any reason, much less a valid reason; rather, they have to consider his case in its

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entirety. It is also relevant for consideration that the second respondent, while deciding the case of the petitioner, ought to have seen under what circumstances and for what relief, the petitioner had approached the Kerala High Court. The respondents, having been parties to the Original Petition before the Kerala High Court and having contested the matter, ought to have seen that the Original Petition had been filed seeking direction to the respondents to produce all the records leading to Ex.P.7 (marked before the Kerala High Court) and to quash the same and to further direct the respondents to appoint the petitioner as Airport Manager and such other reliefs. In other words, the respondents ought to have taken into account the relief sought by the petitioner seeking to call for the entire records leading to Ex.P.7 in which the legality of the proceedings dated 30.04.1996 of the respondents has been questioned. That apart, while considering the petitioner's case for seniority, the respondents should have given due consideration with clear application of mind to the available records, besides giving an opportunity of personal hearing to the parties to decide the issue. Instead, the respondents have simply rejected the petitioner's case by merely stating that they have examined the petitioner's case and without assigning any reason and thereby passing a non-speaking order without giving due consideration to the challenge of the petitioner based on the DPC meeting held on 12.04.1996 and his position as on 30.04.1996.

18. In the light of the discussion made above and the materials placed before this Court and particularly, the order of the Kerala High Court dated 11.01.2002 as well as the claim made by the petitioner based on the records relevant to Ex.P.7 (marked before the Kerala High Court) which is the office order dated 30.04.1996 passed by the respondents and also the eligibility conditions as per the guidelines framed by the respondents for consideration by the DPC, without expressing any opinion on the vires or otherwise of the decision of the DPC in the petitioner's case in view of the settled law that this Court is not supposed to act as an appellate authority over the decision of the DPC, I am of the firm view that the petitioner's claim for retrospective promotion has to be considered, taking note of his case in its entirety. In that view of the matter, since there cannot be mere denial of the petitioner's claim, the impugned order dated 02.07.2003 passed by the second respondent which is of non-speaking nature passed with total non-application of mind non-consideration of material records, is set aside and taking note of the claim made by the petitioner based on Ex.P.7, i.e., the office order of the respondents dated 30.04.1996 and the eligibility conditions as per the guidelines framed by the respondents as indicated above, the matter is remitted back to the respondents for fresh consideration and they are directed to pass an

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appropriate speaking order with due reasoning within a period of eight weeks from the date of receipt of a copy of this order.

In the result, the writ petition is allowed with the above directions. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Chairman
The Airports Authority of India
Operational Offices
Gurgaon Road, New Delhi 110 037

2. The Assistant General Manager(Personnel)
The Airports Authority of India
Gurgaon Road, New Delhi 110 037

+ 1 cc to Mr.R. Parthiban, Advocate, SR No.67107

+ 1 cc to Mr.A. Jenasenan, Advocate, SR No.66944

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Order in
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